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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 225

INSULAR SUGAR REFINING CORPORATION, PETITIONER

v.

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 30-33) is reported in 49 F. Supp. 319.

JURISDICTION

The judgment of the Court of Claims was entered April 5, 1943 (R. 33). On April 19, 1943, a motion for a new trial was filed which was overruled on June 7, 1943 (R. 33-34). The petition for writ of certiorari was filed August 4, 1943 (R. 34). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether the proof in the court below was sufficient to establish that the taxpayer bore the burden of the floor stocks tax involved and did not shift that burden directly or indirectly within the meaning of Section 902 of the Revenue Act of 1936.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 8-12.

STATEMENT

The special findings of fact of the Court of Claims (R. 24-30) may be summarized as follows:

Petitioner was incorporated in 1929 under the laws of the Philippine Islands with its principal office in Manila. During the period involved, petitioner was engaged in refining sugar in the Philippine Islands and selling its refined product both in the Philippine Islands and the United States. Balfour, Guthrie & Company, Ltd., hereinafter referred to as Balfour, was agent for petitioner in the United States with its principal office in San Francisco and branch offices located in Los Angeles, Seattle, Portland, and Tacoma. (R. 24.)

On the first moment of June 8, 1934, the effective date of the floor stocks tax, petitioner owned 521,203 bags of sugar which it had refined and shipped to the United States prior to that date and which were then in possession of its agent

Balfour (R. 25). The floor stocks tax, which became effective on June 8, 1934, was in the amount of \$0.535 per 100-pound bag (R. 25). On that date petitioner through its agent increased its quotation price of sugar by the amount of 55¢ per bag. This increase, when subjected to the normal 2% discount, resulted in a net price increase of 53.9¢ per bag. (R. 26.)

Between June 8, 1934, and approximately April 1, 1935, no shipments were received from petitioner by Balfour for sale on the Pacific Coast and all of petitioner's sales of sugar during this period were made out of the June 8, 1943 inventory (R. 26). Insofar as the present issue is concerned the number of bags upon which petitioner paid a floor stocks tax was 435,895. The tax thus paid at \$0.535 per 100-pound bag totaled \$233,-203.83. (R. 26-27.)

In the period June 8, 1934 to March 1935 the 435,895 bags above mentioned were sold for a total amount of \$1,937,233.88. This was less than the market value of the sugar on June 7, 1934 plus the floor stocks tax, which aggregated \$1,985,547.52. (R. 26-28.)

As shown in detail by a table set forth in the findings of fact of the court below (R. 28), the amounts received by the Los Angeles office upon sale of the sugar in the month of June 1934 exceeded the market value of the sugar on June 7, 1934 plus the tax. Thereafter, it received varying amounts less than this value plus the tax.

The Portland office did not realize the June 7, 1934 value plus the tax during the month of June but it received more than that amount during July, August, September, and October. Thereafter, it received less than this value plus tax. The San Francisco office received an amount greater than the June 7, 1934 value plus the tax for the month of July 1934 and for March 1935, its tax was less than the "minus difference" between market value and price received. For the remainder of the time it received less than this market value plus the tax. The Seattle and Tacoma offices recovered this value less the tax for three months, June, July, and September, 1934. For the rest of the time that office received less than this value plus the tax.

In connection with these sales the Court of Claims found (R. 29):

There is no evidence to show that the market fluctuations, resulting in plaintiff's receiving \$59,466.10 less than the June 7, 1934 value plus tax from the sale of its tax-paid floor stock sugar, were due to the tax nor to show they would not have occurred had there been no tax.

It concluded that petitioner had failed to establish that it bore the burden of the floor stocks tax and therefore denied recovery.

ARGUMENT

The decision below is correct. The fact that on the same date that the tax went into effect peti-

tioner increased the price of its sugar in an amount just sufficient to cover the tax is certainly evidence that the burden of the tax was shifted to the purchasers. *Honorbilt Products, Inc. v. Commissioner*, 119 F. 2d 797 (C. C. A. 3rd); *United States v. H. T. Poindexter & Sons Mer. Co.*, 128 F. 2d 992 (C. C. A. 8th), certiorari denied, 317 U. S. 677; *Colonial Milling Co. v. Commissioner*, 132 F. 2d 505 (C. C. A. 6th), certiorari denied, 318 U. S. 780; and *Williams v. United States*, 48 F. Supp. 647 (C. Cls.), pending on petition for certiorari, No. 194, October Term, 1943. Petitioner's case was based on a showing that the price it received was sometimes less than the tax plus the market value the goods had had before the tax became effective. This showing took no account of normal fluctuations in basic market value. In these circumstances, the court's view that petitioner would have to show as a minimum that the price it received was below the cost plus tax is entirely reasonable.¹ We think that peti-

¹ In our brief in opposition in the *Williams* case we said (p. 7):

"The fact that in *Insular Sugar Refining Corp. v. United States*, 49 F. Supp. 319 (C. Cls.), pending on petition for certiorari, No. 225, October Term, 1943, and *Colonial Milling Co. v. Commissioner*, *supra*, the courts stated, as a minimum requirement, that the taxpayer must show that it has not recovered its cost, plus tax, does not carry the connotation, as petitioner assumes, that such a showing will suffice, notwithstanding any other evidence.

"Cases of this kind necessarily turn upon the particular facts involved and no basis for certiorari is shown by the

tioner's criticism of the opinion as a holding that only taxpayers who sold their inventory at a loss are entitled to recovery is unwarranted.

No logical inference that the burden of the tax was not passed on can be drawn from petitioner's showing. A similar situation was involved in the case of *United States v. H. T. Poindexter & Sons Mer. Co., supra*, where the price was increased on the basic date in an amount sufficient to cover the tax but where the merchandise was sold at less than the market value before the tax attached, plus freight expenses and normal operating sales mark-up. The court, treating as controlling the fact that the prices were raised coincident with the tax, held the proof insufficient to show that the taxpayer had not been relieved of the tax burden.

The decision below is not in conflict with that of *C. B. Cones & Son Mfg. Co. v. United States*, 123 F. 2d 530 (C. C. A. 7th), which the court below distinguished (R. 31). There the court found that the price increase coincident with the effective date of the tax was made to cover the increased cost of raw goods and not to recoup the tax. In the instant case, however, the court has found that "it is expressly shown that" the price was increased by the amount of tax (R. 31) and there is no evidence whatsoever that the increase circumstances that different results were reached upon different facts."

was due to any other factor than the imposition of the tax.

CONCLUSION

The decision below is correct, and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1943.